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No. 81-1859

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PEOPLE OF THE STATE OF ILLINOIS,
Petitioner,

v.

RALPH LAFAYETTE,
Respondent.

On Writ Of Certiorari To The Appellate Court Of Illinois, Third Judicial District

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the inventory search of Lafayette's shoulder bag was unreasonable because Lafayette had a high expectation of privacy in the contents of the bag and there was no need for the police to search inside it.

II. Whether review of the search as incident to the arrest should be precluded since the lower court based its decision on an adequate state ground.

III. Whether the station-house search of Lafayette's shoulder bag, in which he had a high expectation of privacy independent of that in his body and clothing, can be upheld as a delayed search incident to the arrest.

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STATEMENT

The Statement of the Case in petitioner's brief contains unfounded assertions and inaccuracies and also omits facts which are material to the consideration of the questions presented.

Specifically, the state asserts that the record shows that "Respondent decided he would not make bond and instead would spend the night in jail" (Brief for Petitioner at 3). The testimony reveals only the following:

> "THE COURT: Was Lafayette put in jail?
>
> [Officer Mietzner] A. Yes, sir, he was.
>
> THE COURT: Or did he post bond? He didn't post a bond, he went to his cell?
>
> A. There was no bond, controlled substance.
>
> THE COURT: No, I mean when you had him in there to book him on the ordinance violation was he going to sit in the jail cell or was he going to post bond?
>
> A. He was getting undressed and going into his cell, yes, sir." (J.A. 16).

Accordingly, the state's assertions regarding bond are unfounded. The record is simply silent with respect to these matters and even whether Lafayette was offered an opportunity to make bond. (See also Brief for Petitioner at 17, 25)

Another unfounded assertion in the Statement is that Lafayette emptied his pockets "willingly" (Brief for Petitioner at 3). Although Lafayette emptied his pockets upon an order from the police, there is no evidence or finding that he did so willingly (J.A. 10).

Additionally, the state omits relevant facts. At the suppression hearing, Mietzner testified that he patted the outside of the shoulder bag, felt something inside, and then looked inside out of curiosity and because "everything [had] to be inventoried" (J.A. 12, 14-15). The officer was not in fear of his safety when he arrested Lafayette and did not expect to find a

gun or drugs in the bag (J.A. 14-15). Mietzner also testified that the bag could have been sealed inside an inventory or evidence bag and locked in a locker (J.A. 15). Furthermore, the testimony reveals that more than one officer was present when the bag was searched (J.A. 10) and that Mietzner searched the bag without consent (J.A. 8).

Petitioner also erroneously asserts certain testimony as fact, although contradictory testimony, which the state fails to mention, is contained in the record. Based on Officer Mietzner's testimony, the state asserts as a fact that Lafayette "took the purse off his shoulder, placed it on the counter and removed a pack of cigarettes from it" (Brief for Petitioner at 4).[1] The state does not report, however, that Mietzner's testimony of this sequence was contradicted by Lafayette's testimony. He testified that, when one officer grabbed him, Mietzner removed the bag from his shoulder and threw it on the counter (J.A. 7, 10). Since no finding of fact was made by the Illinois courts regarding this conflict, the state should not assert Mietzner's testimony as fact.[2] (See also Brief for Petitioner at 19)

The state also asserts that, at the close of the suppression hearing, it "argued simply that there was no, [sic] 'constitutional bar to looking into [the] bag' " (Brief for Petitioner at 4). Actually, as the appellate court found, the state, at the close of the hearing, argued only that there had been a valid inventory search (J.A. 26). This argument was made in re-

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[1] This summary of Mietzner's testimony itself is inaccurate with respect to the timing of the events. Mietzner actually testified that Lafayette took the shoulder bag off his arm, removed a package of cigarettes and then laid the bag and cigarettes on the counter (J.A. 14).

[2] Where a trial judge makes no express findings, a reviewing court in Illinois is bound to view the evidence based on the testimony most favorable to the prevailing party unless it is clearly unreasonable. *People* v. *Haskell*, 41 Ill. 2d 25, 241 N.E.2d 430, 433 (1968).

sponse to Lafayette's assertion that the case was controlled by *People* v. *Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981), a case which involved only an inventory question. Specifically, the state argued that the court should determine whether *Bayles* controlled and whether there was an alternative way to handle the shoulder bag (J.A. 17-18).

Finally, the state also does not accurately report the appellate court's finding regarding waiver. The state asserts that the appellate court held that it had waived the argument that the search was incident to arrest by failing to raise it "at the trial level" (Brief for Petitioner at 5). Actually the appellate court held that the state waived the search-incident-to-arrest argument by failing to raise it "at the suppression hearing" (J.A. 26-27). In this regard the state does not point out that its trial court brief in opposition to the motion to suppress, which, according to the state, raised the search-incident-to-arrest question, was filed twenty days after the hearing (J.A. 1, 6, 19).

SUMMARY OF ARGUMENT

The fact of lawful arrest does not, as the state maintains, authorize both a search incident to arrest and a full inventory of the arrestee's belongings. Unlike a search incident to arrest, an inventory, which arises in a non-criminal context, is justified by the lawful custody of property and is conducted for reasons primarily related to that property. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). Consequently, separate consideration of these theories is essential.

I. The inventory of Lafayette's shoulder bag was unreasonable since the interests advanced to justify it were outweighed by his privacy interests in the bag. *Opperman*. Although *Opperman* upheld the inventory search of a car, it did not authorize an inventory of a repository of personal effects. In *Opperman* the Court held that a routine automobile inventory, found by lower courts to be essential to perform caretaking functions, was reasonable.

Implicit in *Opperman*, however, is a limitation: an inventory must be reasonable in scope. Consequently, a majority of courts considering inventories of containers have employed this same analysis in finding such searches unreasonable in scope. There is a greater expectation of privacy in a container than in an automobile and such expectation is not reduced by virtue of an arrest. Furthermore, safeguarding a shoulder bag presents none of the substantial burdens involved in caretaking automobiles. *Arkansas* v. *Sanders*, 442 U.S. 753 (1977). Courts have thus found virtually no need for the inventories since the containers can be sealed, secured and inventoried as a unit.

The state urges that *Opperman* be extended to authorize station-house inventories, relying on four interests purportedly necessitating them: safeguarding the property, protecting the police from claims of lost or stolen property, maintaining jail security and preventing harm to police, and ascertaining or verifying identity. Sealing, securing and inventorying containers as a unit adequately serve the first three interests. Thieves, vandals, or prisoners can have no access to the locked property. Similarly, inventorying containers without opening them actually minimizes property claims since the contents will never have been touched by police. The fourth interest, the need to ascertain identity, is generally served by merely asking for identification.

In this case there was no need to inventory the contents of the bag. Officer Mietzner concluded that no danger existed and the contents could easily have been safeguarded by sealing the shoulder bag in an evidence bag and placing it in a locker. Furthermore, the officer claimed no need to verify Lafayette's identity. Other facts suggesting the inventory was unreasonable were the failures: to seek Lafayette's consent, to advise him of the purpose of the inventory, and to permit him to post bond or make other arrangements for the caretaking of his belongings. Therefore, because there was no need to inventory the contents of Lafayette's shoulder bag, in which he had a substantial expectation of privacy, the inventory was un-

reasonable. The state's contention that suppression is not required in light of the purported good faith of the police was waived since it was not raised below. In any event, no good faith was shown since the police procedure is contrary to established Illinois law.

II. Review of the search as incident to arrest should be precluded since the appellate court rejected the issue on an adequate state ground. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945). As the state concedes, the court below based its decision entirely on waiver, finding the state failed to raise the issue of the search as incident to arrest in a timely fashion. The mere discussion by the appellate court of the federal question in dicta does not warrant review by this Court. The waiver holding was proper since the state did not raise the issue at the suppression hearing.

Application of the Illinois waiver rule in this case serves two legitimate state interests since, as a result of the state's untimely raising of the issue, the court below was precluded from hearing an adequate presentation of the facts and was prevented from considering an additional state ground. *Cardinale* v. *Louisiana*, 394 U.S. 437 (1969). Review of the federal question is particularly inappropriate in light of the state's failure to contest the waiver issue in Illinois courts.

III. Assuming, arguendo, the issue is properly before this Court, the search, being remote in time and place from the arrest, was nevertheless beyond the scope of the search-incident exception and, in any event, unreasonable. While an arrest justifies a warrantless contemporaneous search of the person and the area within his immediate control to remove weapons and to prevent the loss of evidence, the scope of the search must be consistent with these purposes. *Chimel* v. *California*, 395 U.S. 752 (1969). Thus this Court has placed both temporal and spatial limitations on the exceptions. *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968). *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1977), reaffirmed these limitations. In both cases the Court found that, in the absence of any exigency, a

warrant was necessary to search a container since the high expectation of privacy in such container was not reduced by virtue of the arrest.

Lafayette's privacy interest in his shoulder bag was not reduced merely because of his arrest. A warrant was required for the delayed search of the bag since the search was not based on any exigency and the bag was securely in the control of police. Although the state asserts, contrary to the appellate court finding, that the bag was not in Mietzner's exclusive control, the testimony to that effect was controverted and thus cannot, under Illinois law, be accepted as fact. In any event, the search was unreasonable in light of the surrounding circumstances. Mietzner patted the bag and did not believe any contraband or guns were in it. Given the absence of probable cause or any exigency, the search was particularly unreasonable.

United States v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974), do not control this case since neither case considered the propriety of the delayed search of a repository for personal effects. Although *Edwards* suggested that property carried from the place of arrest by the arrestee may later be seized and searched, the holding was expressly limited to the facts. *Abel* v. *United States*, 362 U.S. 217 (1960), relied on in *Edwards*, is distinguishable from this case because a search begun at the time of arrest was continued later and was limited to property the arrestee chose to bring with him. Furthermore, *Abel's* continuing validity is questionable due to its reliance on precedent subsequently overruled and its inconsistency with *Chadwick* and *Sanders*.

The Government contends that Lafayette's privacy interest in his bag was reduced by virtue of the arrest because the bag was "immediately associated with the person." This phrase from *Chadwick* refers to clothing and not repositories being carried, such as shoulder bags. Although some courts apply a case-by-case test based on this phrase, this test has proven to be unworkable. In any event, this Court recognized in *United States* v. *Ross*, ___ U.S. ___, 102 S. Ct. ___, 72 L. Ed. 2d

572 (1982), that constitutional distinctions between containers are impermissible. The more workable rule, which protects privacy interests, is that advanced by Lafayette: containers accessible to the arrestee may be searched without a warrant at the time of arrest; however, once the accused is secured at the station and the container removed from his reach, a warrant is required.

ARGUMENT

The state argues that the fact of lawful arrest of an individual authorizes both a search incident to arrest and a full inventory of his belongings (Brief for Petitioner at 6). While it is true that a lawful arrest authorizes a search incident to arrest [*United States* v. *Robinson*, 414 U.S. 218 (1973)], the arrest itself does not, as the state contends, also authorize an inventory search. Virtually every court and commentator recognizes that a station-house inventory search of an arrestee's effects is not authorized by virtue of the arrest or the booking process itself, but rather by the fact that the police have lawful custody of belongings which they must safeguard.[3] Thus no inventory search of an arrestee's effects is authorized if the police are without reason to maintain custody of the effects, such as when

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[3] *See, e.g., United States* v. *Robinson*, 414 U.S. 218, 258 n.7 (1973) (Marshall, J., dissenting); *United States* v. *Mills*, 472 F.2d 1231 (D.C. Cir. 1972); *Zehrung* v. *State*, 569 P.2d 189, 193 (Alas. 1977), *modified*, 573 P.2d 858 (1978); *United States* v. *Davis*, 501 F. Supp. 23 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981); *People* v. *Dixon*, 392 Mich. 691, 222 N.W.2d 749, 756 (1974); *State* v. *Carner*, 28 Wash. App. 439, 624 P.2d 204 (1981); *Manalansan* v. *State*, 48 Md. App. 667, 415 A.2d 308, 311 (1980); 2 W. LaFave, *Search and Seizure* § 5.3, at 306, and § 5.5, at 356 (1978); Note, 53 B.U.L. Rev. 858, 864 (1973). This principle is also implicit in the holdings of several other cases. See cases *infra* nn. 8 & 9.

It should be noted that there was no arrest in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The Court upheld an inventory search of a lawfully impounded automobile because of the caretaking functions which were imposed upon the police.

an arrestee is released on bail or makes other arrangements for the safekeeping of his belongings. *See, e.g., United States* v. *Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980); *State* v. *Slockbower*, 79 N.J. 1, 397 A.2d 1050, 1055 (1979).

The reasons for conducting these searches are also different. An inventory search may be conducted for the protection of the owner's property and protection of the police against disputes over lost or stolen property. *South Dakota* v. *Opperman*, 428 U.S. 364, 369 (1976). On the other hand, a search incident to arrest is permitted in order to protect the officer from the arrestee and to prevent the destruction of evidence. *Chimel* v. *California*, 395 U.S. 752 (1969).

There are other fundamental differences as well. For example, since an inventory search involves a non-criminal context, its analysis does not include an examination of probable cause or the warrant requirement. *Opperman*, 428 U.S. at 370 n. 5. In contrast, a search incident to arrest arises in a criminal context and is viewed as "a traditional exception to the warrant requirement." *Robinson*, 414 U.S. at 224.

The state's melding of these two separate theories thus is erroneous. Each type of search merits consideration within its own particular analytical framework.

In part I of Lafayette's argument it will be shown that there was no need for the police to conduct an inventory search of the contents of the shoulder bag, in which he had a high expectation of privacy. In part II Lafayette will demonstrate that review of the search as one incident to the arrest should be precluded by the holding of the court below on an adequate state ground—the waiver of this issue for failure to raise it in a timely fashion. Finally, in part III it will be shown that the search, in any event, was unreasonable and beyond the scope of the search-incident-to-arrest exception to the warrant requirement because it was remote in time and place from the arrest and conducted without any exigency or probable cause.

I. THE INVENTORY SEARCH OF LAFAYETTE'S SHOULDER BAG WAS UNREASONABLE BECAUSE LAFAYETTE HAD A HIGH EXPECTATION OF PRIVACY IN THE CONTENTS OF THE BAG AND THERE WAS NO NEED FOR THE POLICE TO SEARCH INSIDE IT.

The inventory "search"[4] of the contents of Ralph Lafayette's shoulder bag cannot withstand scrutiny under the Fourth Amendment standard of reasonableness—the standard which inventory searches must meet. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). Essentially, the test for determining reasonableness involves a balancing of the interests advanced to justify the intrusion against the interest of the individual in the privacy of his effects. *Camara* v. *Municipal Court*, 387 U.S. 523, 535-37 (1967); *Opperman*, 428 U.S. at 377-78 (Powell, J., concurring). In applying this test this Court should examine "all the facts and circumstances of this case in light of the principles set forth in . . . prior decisions." 428 U.S. at 375.

A. *Opperman* Did Not Authorize Inventory Searches Of The Contents Of Repositories Of Personal Effects, Such As Shoulder Bags, In Which There Is A High Expectation Of Privacy.

The Court in *Opperman* found that the inventory search of the contents of a glove compartment in an automobile which had been lawfully impounded met the reasonableness standard. It must be emphasized, however, that the instant case involves an inventory in a different context: a station-house

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[4] Whether or not an inventory constitutes a "search" for Fourth Amendment purposes would not appear to be a critical question in this case since the state has never argued that the inventory was exempt from the Fourth Amendment standard of reasonableness. *South Dakota* v. *Opperman*, 428 U.S. 364, 371 n.6 (1976). In any event, Lafayette's position is that an inventory does constitute a search. *See South Dakota* v. *Opperman*, 428 U.S. at 377 n.1 (Powell, J., concurring); 428 U.S. at 385 n.2 (Marshall, J., dissenting). *See also* 2 W. LaFave, *Search and Seizure* § 5.3, at 306 & n.23 (1978).

search of a shoulder bag pursuant to the Kankakee Police Department's policy to inventory "everything" that accompanies an arrestee to the station (J.A. 15). The inventory involved property which the police had taken from Lafayette and not effects which were going to accompany him into the jail cell. *See Bell* v. *Wolfish*, 441 U.S. 520 (1979).

There are fundamental distinctions between automobile and station-house inventories. The expectation of privacy in the contents of a shoulder bag, a repository for personal effects, is substantially higher than that in an automobile. As was noted by Justice Powell in a concurring opinion in *Rakas* v. *Illinois*, 439 U.S. 128, 153-54 (1978): "Nothing is better established in Fourth Amendment jurisprudence than the distinction between one's expectation of privacy in an automobile and one's expectation when in other locations." Moreover, as this Court has recognized, the expectation of privacy in repositories accompanying or being carried by a person at the time of arrest is not reduced by virtue of an arrest. *United States* v. *Chadwick*, 433 U.S. 1, 16 n.10 (1977); *Arkansas* v. *Sanders*, 442 U.S. 753, 766-67 (1979) (Burger, C.J., concurring).[5]

Not only are the privacy interests distinct, but the need to conduct a search in each type of inventory is different. Unlike the significant burdens and specific problems involved in the caretaking of automobiles, which make an inventory search essential, no comparable burdens or problems are involved in safeguarding repositories of personal effects such as shoulder bags. *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14. Accordingly,

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[5] The Government, in its amicus brief, argues that "privacy concerns have little relevance in the case of routine inspection of the contents of a container for purposes unrelated to seeking evidence of a crime" (Brief for Government at 26). This argument is an anomaly, since it is absurd to argue that Fourth Amendment privacy protections fully apply only to an individual suspected of criminal behavior. *See Opperman*, 428 U.S. at 385 n.2 (Marshall, J., dissenting).

there is no need to conduct an inventory of the contents of a bag to be kept at the station.

A close look at *Opperman* demonstrates that its holding is limited to its facts and does not authorize the search of repositories of personal effects. In *Opperman*, the Court concluded that routine inventory searches of the contents of lawfully impounded automobiles were reasonable. Interests recognized to justify such intrusions included: (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen property; and (3) protection of the police from potential danger.[6] 428 U.S. at 369. These interests favoring intrusion were found to outweigh the citizen's interest in the privacy of the contents of his automobile, particularly since that privacy interest was recognized to be significantly less than the expectation of privacy associated with one's home. The Court noted that the practice of inventorying the contents of an automobile had been almost uniformly found by the states to be "essential to respond to incidents of theft or vandalism." 428 U.S. at 369.

With respect to the record before it in *Opperman*, the Court upheld the routine inventory search of the contents of a glove compartment. The Court noted that the car had been legally impounded, the owner was not present to make other arrangements for the safekeeping of his belongings, and the routine inventory was prompted by the presence in plain view of certain valuables. 428 U.S. at 375.

The Court also found, in footnote ten, that "[t]he inventory was not unreasonable in scope." 428 U.S. at 376 n.10. The principle implicit in this footnote, that the scope of an inventory search is not unlimited, was addressed as well in the concurring and dissenting opinions. Justice Powell, in a concur-

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[6] The Court also noted the frequent need to determine whether a vehicle had been stolen and thereafter abandoned. 428 U.S. at 369. This interest does not apply to a station-house inventory of an arrestee's effects and is not presented on the facts or claimed by the state.

ring opinion, observed that the Court's holding provided no general license for the police to examine all the contents of automobiles, such as letters or checkbooks. 428 U.S. at 380 & n.7. Justice Marshall, in a dissenting opinion, agreed with Justice Powell's observation and noted that the Court's opinion did not authorize the search of containers which could be sealed, removed and secured without further intrusion. 428 U.S. at 388 n.6. Consistent with these statements, a majority of courts which have addressed the question have concluded that an inventory search of luggage and other removable containers in a vehicle is unreasonable in scope.[7]

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[7] *United States* v. *Bloomfield*, 594 F.2d 1200 (8th Cir. 1979); *United States* v. *Hill*, 458 F. Supp. 31, 33-37 (D.D.C. 1978); *State* v. *Prober*, 98 Wis. 2d 345, 297 N.W.2d 1, 7 (1980); *United States* v. *Vallieres*, 443 F. Supp. 186, 191 (D. Conn. 1977); *State* v. *Pace*, 171 N.J. Super. 240, 408 A.2d 808, 813 (1979); *State* v. *Houser*, 95 Wash. 2d 143, 622 P.2d 1218, 1226-28 (1980); *State* v. *Downes*, 285 Or. 369, 591 P.2d 1352 (1979); *State* v. *Bramlett*, 94 N.M. 263, 609 P.2d 345, 347-48 (Ct. App. 1980); *Obermeyer* v. *State*, 97 Nev. 158, 625 P.2d 95, 96-97 (1981); *Manalansan* v. *State*, 48 Md. App. 667, 415 A.2d 308 (1980); *Smith* v. *State*, 48 Md. App. 425, 427 A.2d 1064, 1065 (1981); *People* v. *Grana*, 185 Colo. 126, 527 P.2d 543, 545 (1974); *State* v. *Keller*, 265 Or. 622, 510 P.2d 568, 570 (1973); *State* v. *McDougal*, 68 Wis. 2d 339, 228 N.W.2d 671, 678 (1975); *State* v. *Gwinn*, 301 A.2d 291, 294 (Del. 1972); *People* v. *Counterman*, 192 Colo. 152, 556 P.2d 481, 485 (1976); *People* v. *Miller*, 110 Mich. App. 270, 312 N.W.2d 225, 228 (1981); *State* v. *Roth*, 305 N.W.2d 501 (Iowa 1981), *cert. denied*, ___ U.S. ___, 70 L.Ed. 2d 174 (1981); *People* v. *Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346, 1352 (1980), *cert. denied*, 453 U.S. 923 (1981); *State* v. *Morgan*, 3 Kan. App. 2d 667, 671, 600 P.2d 155, 159 (1979); *State* v. *Potter*, ___ Kan. App. 2d ___, 648 P.2d 1162, 1165 (1982); *People* v. *Salter*, 91 Ill. App. 3d 831, 414 N.E.2d 1252, 1255 (1980); *State* v. *Daniel*, 589 P.2d 408, 417 (Alas. 1979). See Amicus Brief by California Public Defender at 20, where it is explained that a majority of the Court in *Opperman* shared the view that there are limits on the scope of automobile inventory searches. *See also United States* v. *Bosby*, 675 F.2d 1174, 1179-80 (11th Cir. 1982); *State* v. *Rome*, 354 So. 2d 504 (La. 1978).

Opperman thus does not authorize the search of contents of repositories such as shoulder bags. Nor has it been read to provide such authorization.

B. *Opperman's* Holding That An Inventory Search Of An Automobile Was Reasonable Should Not Be Extended To Validate A Station-House Inventory Of The Contents Of A Shoulder Bag.

Numerous courts which have considered a station-house search of the contents of an arrestee's repositories of personal effects have found it to be beyond the scope of a permissible inventory.[8] These courts find that there is virtually no need to search the contents of the containers since they can simply be sealed, secured and inventoried as a unit. This caretaking procedure is found to be workable and reasonable by these courts.

The state, nevertheless, urges this Court to extend *Opperman's* holding to station-house inventory searches of the contents of luggage and other repositories. The various interests that are advocated by the state as grounds for conducting an inventory search of the contents of a repository for personal effects such as shoulder bag are (1) protection of the owner's property while it remains in police custody; (2) protection of the police against claims or disputes over lost or stolen prop-

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[8] *United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1288-90 (9th Cir. 1981); *United States* v. *Schleis*, 582 F.2d 1166, 1172-73 (8th Cir. 1978); *United States* v. *Cooper*, 428 F. Supp. 652, 654-55 (S.D. Ohio), *aff'd*, 564 F.2d 100 (6th Cir. 1977); *United States* v. *Davis*, 501 F. Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981); *State* v. *Kaluna*, 55 Haw. 361, 520 P.2d 51, 60-62 (1974); *Reeves* v. *State*, 599 P.2d 727, 735-36 (Alas. 1979); *Bradford* v. *State*, ___ Ind. App. ___, 401 N.E.2d 77, 80 (1980); *People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033, 1034-35 (1981); *Hicks* v. *State*, 398 So. 2d 1008, 1010 (Dist. Ct. App. Fla. 1981). *See also United States* v. *Mills*, 472 F.2d 1231, 1240-41 (D.C. Cir. 1972); *People* v. *Hamilton*, 74 Ill. 2d 457, 386 N.E.2d 53 (1979).

erty; (3) the need to maintain jail security and prevent harm to the police; and (4) the need to ascertain or verify the identity of the person arrested (Brief for Petitioner at 7, 24-25).

There is virtually no need, however, for the police to search inside a shoulder bag in order to advance these interests. Sealing, securing and inventorying the bag as a unit achieves the first three interests and the fourth interest—the need to verify identity—in most cases will be advanced by simply asking the arrestee to produce identification.

1. Sealing, securing and inventorying a shoulder bag as a unit safeguards the property, protects the police from false claims, and maintains jail security.

The interests generally recognized to justify an inventory—protection of the owner's property, protection against claims of lost or stolen property, and maintenance of jail security to prevent escape and harm—are served by sealing, securing and inventorying the property as a unit. In the first place, sealing, securing and inventorying a container as a unit, without inventorying its contents, safeguards the police from claims or disputes over lost or stolen property. The police are actually less likely to be accused of theft or loss of the contents if the container "has never been opened and its contents have never been removed, reshuffled and replaced." *United States* v. *Bloomfield*, 594 F.2d 1200, 1202 (8th Cir. 1979). As Professor LaFave has noted:

> "False claims cannot be avoided and seem more likely when the contents are handled and inventoried (a time when, the owner might later claim, some of his property was taken), as compared to when the container is immediately sealed." 2 W. LaFave, *Search and Seizure* § 5.5, at 360 n.50 (1978). *See Opperman*, 428 U.S. at 378-79 (Powell, J., concurring); 428 U.S. at 391 (Marshall, J., dissenting).

Moreover, since the inventory of an arrestee's effects is generally conducted in his presence at the station house, the police can obtain his signature acknowledging the correctness of the inventory. *Reeves* v. *State*, 599 P. 2d 727, 736-37 (Alas.

1979). It has even been suggested that the police might require the arrestee to sign a waiver releasing them of responsibility for the contents of unopened items. *State* v. *Kaluna*, 55 Haw. 361, 520 P.2d 51, 61-62 (1974); *See United States* v. *Robinson*, 414 U.S. 218, 258 n.7 (1973) (Marshall, J., dissenting).

Furthermore, safeguarding property as a unit places no burden on the police. In the first place, the police already perform similar functions, such as that associated with the caretaking of evidence. Secondly, simply listing "one shoulder bag" on an inventory sheet is less burdensome than listing the bag as well as its contents. *See United States* v. *Hill*, 458 F. Supp. 31, 37 (D.D.C. 1978).

A majority of the courts addressing this question thus recognize, as did the appellate court in this case, that securing containers of personal effects as a unit is better than inventorying the contents of the container.[9] Indeed, as the appellate court in this case found, there was no need to search inside Lafayette's shoulder bag because there were both inventory bags, in which to seal it, and lockers, in which to secure it (J.A. 15).[10]

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[9] *See, e.g., United States* v. *Monclavo-Cruz*, 662 F.2d 1285, 1289 (9th Cir. 1981); *State* v. *Gwinn*, 301 A.2d 291, 294 (Del. 1972); *People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033, 1035 (1981); *State* v. *McDougal*, 68 Wis. 2d 399, 228 N.W.2d 671, 678 (1975). *See* cases cited in nn. 7 & 8. *See also* 2. W. LaFave, *Search and Seizure* § 7.4, at 571-72 (1978); Comment, 1968 U. Ill. L. F. 401, 407-08 and additional cases cited in Amicus Brief by California Public Defender at 26-27.

[10] The Government in its amicus brief cites *Cady* v. *Dombrowski*, 413 U.S. 433 (1973), and *United States* v. *Martinez-Fuerte*, 428 U.S. 543 (1976), and argues that the reasonableness of an inventory does not depend on whether the police interests in making the intrusion can be accomplished by less intrusive means, such as securing the repository as a unit (Brief for Government at 25). A careful reading of the cited cases shows that the Court was referring to less intrusive means which were unreasonable by virtue of their prohibitiv cost or the heavy burden they would involve. This is the precise point

Denying access to an arrestee's effects also safeguards the property, maintains jail security and prevents harm. Given the nature of a police station, there is no danger that objects will be obtained from a secured property room or locker and used to attempt an escape or cause harm to the police. Nor is there any risk that vandals might obtain a weapon or steal or damage the arrestee's effects. *See United States* v. *Cooper*, 428 F. Supp. 652, 654 (S.D. Ohio 1977); 2 W. LaFave, *Search and Seizure* § 5.5, at 360 n.50 (1978). *Cf.* 2 W. LaFave, *Search and Seizure* § 7.4, at 572 (1978) (risk of danger in automobile context questioned). This situation thus provides a sharp contrast to that in *Opperman*, where inventory searches of automobiles were considered to be "essential to respond to incidents of theft and vandalism." 428 U.S. at 369.

Moreover, protecting the police from potential booby-traps and explosives would be better accomplished by securing the container as a unit. As one court has noted, it would be foolhardy to blindly and routinely search every container for explosives and booby-traps. *United States* v. *Cooper*, 428 F. Supp. 652, 655 (S.D. Ohio 1977). *See* 2 W. LaFave, *Search and Seizure* § 5.5, at 360 n.50 (1978).

This is not to say that all repositories being inventoried may never by searched to check for explosive devices. If the police have reason to believe that a certain repository contains some immediately dangerous instrumentality, then it should be searched in a professional manner. *United States* v. *Chadwick*, 433 U.S. 1, 15 n.9 (1977).

This case, however, does not contain any exigent circumstances. Lafayette was arrested at the local Town Cinema for disturbing the peace. The arresting officer was not in any fear

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recognized in *Opperman*, i.e., that the less intrusive alternative of posting a security guard at the car-impound lot would be prohibitively expensive. 428 U.S. at 379 (Powell, J., concurring). "No comparable burdens are likely to exist with respect to the seizure of personal luggage." *Arkansas* v. *Sanders*, 442 U.S. at 765 n.14.

of his safety and did not find it necessary to conduct a pat-down search of Lafayette or his shoulder bag (J.A. 9, 14-15). At the station, Mietzner took possession of the bag and patted it from the outside. Feeling that something was inside, he searched the contents (J.A. 12, 14). He did not expect to find drugs or a gun inside, but conducted the search out of curiosity and because "everything" had to be inventoried (J.A. 14-15). The facts thus militate against any suggestion that the shoulder bag contained some immediately dangerous instrumentality.[11]

Accordingly, a search inside the shoulder bag was not needed to safeguard the property, protect the police from false claims, or maintain jail security since the officer could have simply inventoried the bag as a unit, sealed it in a bag, and secured it in a locker.

2. The need to verify the identity of an arrestee can be accomplished in most cases by simply making a request for identification papers and, in any event, is not presented on the facts of this case.

In most cases it simply is not necessary to search the contents of an arrestee's repositories for personal effects in order to ascertain or verify his identity. If the police do not personally know the arrestee, they can ask him for identification, such as a driver's license. Certainly it would be unreasonable for the police to search all of an arrestee's personal effects, posses-

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[11] The state cites *United States* v. *Robinson*, 414 U.S. 218 (1973), and argues that this Court should ignore the facts which show that there was no danger in this case. *Robinson*, however, has no application here. In *Robinson*, the Court upheld a search of a person at the time of his lawful arrest without requiring any assessment of whether there was cause to search for weapons or evidence because the determination to search was "necessarily a quick ad hoc judgment." 414 U.S. at 235. In conducting an inventory search at the station house, however, the police are not presented with a criminal context or the dangers which exist at the time of arrest. Nor are the police required to make quick judgments.

sions and papers, in order to verify identity, without first asking the arrestee to produce some identification. A rule allowing a search to verify identity could easily be abused and serve as a pretext for a general search. *See State* v. *Frazier*, 318 N.W.2d 42, 44 n.1. (Minn. 1982); 3 W. LaFave *Search and Seizure* § 9.4(g) (1982 Supp.). Of course, a fingerprint check, perhaps the best method to verify identify, is available to the police in situations where they are doubtful of the arrestee's true identity.

In any event, this case does not present this question. The state has never advanced this need nor does the record support a claim that the search was based upon the need to identify Ralph Lafayette as the person arrested. Accordingly, this potential interest is irrelevant in this case. *See State* v. *Prober*, 98 Wis. 2d 345, 297 N.W.2d 1, 11 (1980). Indeed the officer might have known Lafayette personally or might have asked for and received identification papers, such as an Illinois driver's license, which bears a photograph.[12]

3. Other considerations in this case, including the absence of consent to search, militate against upholding the station-house inventory.

Additional factors in this case support a finding of unreasonableness. For example, the inventory was conducted without Lafayette's consent and he was not advised of the purpose of the inventory (J.A. 7-8). Moreover, he apparently was not given an opportunity to make other arrangements for the safekeeping of his belongings or informed of his right to post a cash bond to obtain his release. Furthermore, since

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[12] The Government suggests that "the permissibility of conducting a routine inventory should not turn on . . . the facts of a particular case" (Brief for Government at 23-24). This position ignores the test applied in *Opperman*, 428 U.S. at 375. Evidently, the Government advocates such an approach, which would have this Court ignore the facts of this case, because it cannot argue that the search was reasonable, given those facts.

Lafayette was arrested for a petty offense, the police would very likely have retained custody of his belongings for only a short period of time until he was able to post a bond.[13] *See United States* v. *Davis*, 501 F. Supp. 23, 26 (N.D. Ga. 1980), *aff'd*, 647 F.2d 1119 (5th Cir. 1981).

All of these factors show the search was unreasonable. Certainly, it would have been consistent with Fourth Amendment principles to seek Lafayette's consent, advise him of his right to post bond, and provide him an opportunity to have someone retrieve his belongings. Lower courts recognize that these factors merit great weight and find inventory searches to be unreasonable where the arrestee was not asked for consent or given an opportunity to post bail or to make other arrangements for the caretaking of his belongings.[14]

One final matter merits attention. The state argues that the evidence should not be suppressed because, according to the

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[13] Lafayette was arrested for disturbing the peace, a petty offense and an ordinance violation (J.A.8-9, 13, 21). Under Illinois law he could have obtained his release by posting a $50.00 cash bail. *See* Ill. Rev. Stat. ch. 110A, § 528(a) (1979).

In the amicus brief filed by Americans for Effective Law Enforcement on behalf of the state, the amicus reproduces a property index card which purportedly was signed by Lafayette. Although this card is not part of the record, it is interesting to note that it indicates Lafayette had $79.00 and thus could have posted bail. See Brief by Americans for Effective Law Enforcement at 10.

[14] *See, e.g., Zehrung* v. *State*, 569 P.2d 189, 193 (Alas. 1977), *modified*, 573 P.2d 858 (1978); *United States* v. *Mills*, 472 F.2d 1231 (D.C. Cir. 1972); *United States* v. *Wilson*, 636 F.2d 1161, 1165 (8th Cir. 1980); *State* v. *Killcrease*, 379 So. 2d 737 (La. 1980); *State* v. *Hatfield*, 364 So. 2d 578 (La. 1978); *State* v. *Schmidt*, 359 So. 2d 133 (La. 1978); *State* v. *Mangold*, 82 N.J. 575, 414 A.2d 1312 (1980); *Gaston* v. *State*, 155 Ga. App. 337, 270 S.E.2d 877 (1980); *State* v. *Southwell*, 369 So. 2d 371 (Dist. Ct. App. Fla. 1979). *See also*, 2 W. LaFave, *Search and Seizure* § 7.4, at 571 (1978) ("[T]here is much to be said in favor of the proposition that the police should [conduct an]

state, the police maintained a good-faith belief that they acted reasonably in searching inside the bag (Brief for Petitioner at 25-26).

Lafayette's response is twofold. In the first place, the state has waived this contention by never raising it before. *See Cardinale* v. *Louisiana*, 394 U.S. 437 (1969), and part II of this brief. Secondly, the Kankakee Police Department policy that "everything [must] be inventoried" (J.A. 15) conflicts with Illinois law as it existed at the time the inventory was conducted in this case, September 1, 1980 (J.A. 7). Since 1979 it has been clear that repositories of personal effects should be inventoried as units without searching their contents. *People* v. *Hamilton*, 74 Ill. 2d 457, 386 N.E.2d 53 (1979); *People* v. *Bayles*, 76 Ill. App. 3d 843, 395 N.E.2d 663 (1979), *aff'd*, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981). Given the status of Illinois law, the state's suggestion of good faith is puzzling.

In sum, the state's position that *Opperman's* holding should extend to this case should be rejected. As Lafayette has shown, he had a high privacy interest in the contents of his bag. Moreover, in contrast to the essential need to conduct automobile inventories, the police had no need to search inside his bag in order to achieve inventory objectives. The state's posi-

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inventory . . . when the owner . . . is at hand only if he elects that alternative.")

The need for the owner's consent was advocated by the dissent in *Opperman*, but rejected in the opinion of the Court since the lack of consent apparently would not protect the police from claims of lost or stolen property or protect the public from vandals who might obtain a firearm. 428 U.S. at 376 n.10. This reasoning would not apply to an inventory search of an arrestee's shoulder bag conducted at the police station in his presence and without his consent. Unlike automobiles, the bag can be secured within the confines of the station and protected from theft, loss and vandals. The consent theory advanced by the dissent in *Opperman* thus merits renewed consideration.

tion ignores the fundamental distinctions that exist between these two types of inventories. Its argument that *Opperman's* holding should extend to this case because the station-house search was an "inventory" conducted pursuant to "routine procedure" essentially amounts to an indiscriminate use of labels to avoid a serious constitutional question. Justice Cardozo described this use of labels as follows:

> "A fertile source of perversion in constitutional theory is the tyranny of labels . . . [A] court frames a rule which is general in form, though it has been wrought under the pressure of particular situations. Forthwith another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence." *Snyder* v. *Massachusetts*, 291 U.S. 97, 114 (1933).

Because Lafayette's privacy interest outweighed the need for the intrusion, the search was unreasonable. Consequently, the judgment of the appellate court should be affirmed.

II. REVIEW OF THE SEARCH AS INCIDENT TO THE ARREST SHOULD BE PRECLUDED SINCE THE LOWER COURT BASED ITS DECISION ON AN ADEQUATE STATE GROUND.

As an alternative argument, the state contends that, even if the search of Lafayette's shoulder bag was not a valid inventory search, it nevertheless was justified as a delayed search incident to his arrest. This additional question should not be reached since it was rejected by Illinois courts on an adequate and independent state ground, i.e., the Illinois rule that an issue is waived if not raised in a timely fashion.

From its foundation this Court has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds. *Murdock* v. *City of Memphis*, 20 Wall. 590, 636 (1875); *Fox Film Corp.* v. *Muller*, 296 U.S. 207 (1935). In *Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945), the Court, recognizing the limitations on its jurisdiction

resulting from the partitioning of power between the state and federal judicial systems, explained:

> [O]ur power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion.

Furthermore, this Court has consistenly found state procedural rules, including waiver rules, to provide an adequate and independent basis for a judgment, so long as enforcement of the rule serves a legitimate state interest [*Henry* v. *Mississippi*, 379 U.S. 443, 447 (1965)], or at least is not arbitrary or a mere device to prevent review of the federal question [*McCoy* v. *Shaw*, 277 U.S. 302 (1928)].

The appellate court opinion demonstrates that the sole basis for its rejection of the search-incident-to-arrest theory was waiver: "[W]e find the State has waived this argument for the purposes of appeal by failing to raise it at the suppression hearing" (J.A. 27). After this direct statement of its holding, the court went on to express its opinion that the search-incident theory did not apply, prefacing its discussion with the statement: "Moreover, even assuming, *arguendo*, that the State has not waived this argument, the . . . search . . . did not constitute a valid search incident to a lawful arrest" (J.A. 27). Thus, the discussion of the federal question was merely dicta. Indeed, the state concedes this point in its brief, admitting that the appellate court, after it "*held*" the argument waived, merely "*noted* . . . that even if the argument was raised, the search violated the fourth amendment" (Brief for Petitioner at 5) (emphasis added). See also Petition for Cert. at 4.

The state contends that the appellate court, while finding waiver, nevertheless went on to "discuss" the question of search incident to arrest (Brief for Petitioner at 13). However, as the cases relied upon by the state make clear, the mere discussion of a federal question does not warrant review by this Court. *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Raley* v. *Ohio*,

360 U.S. 423 (1959). Only where the state court has reached and decided the question is review permitted.

It is significant that the state does not contend that application of the Illinois waiver rule does not serve a legitimate state interest. *See Michigan* v. *Tyler*, 436 U.S. 499, 512 n.7 (1978). Indeed two state interests are apparent in this case. Because the state failed to advance its claim in a timely fashion, the record is insufficient for a proper determination of the federal question. As the Court recognized in *Cardinale* v. *Louisiana*, 394 U.S. 437, 439 (1969), "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind."[15]

A second legitimate interest in enforcement of the rule lies in the fact that the state's untimely raising of the issue precluded the defendent from advancing, and the trial court from considering, an adequate and independent ground based on Illinois substantive law. As this Court has consistenly recognized, states are free to impose greater restrictions under their own law on police activity than those required under the federal constitution. *Oregon* v. *Hass*, 420 U.S. 714 (1975). In Illinois a search incident to arrest is justified only when conducted for any of four purposes specifically enumerated by statute: protection of police from attack, prevention of escape, discovery of fruits of the crime, or discovery of evidence or an instrumentality of a crime. Ill. Rev. Stat. ch. 38, § 108-1 (1979); *People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033, 1034 (1981). Because the record indicates that none of the four purposes

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[15] For example, while the state claims that the bag was not in Mietzner's exclusive control immediately prior to the search (Brief for Petitioner at 15, 19-20), the record does not reveal the exact circumstances at that time, such as the distance between Lafayette and the bag and the number of officers who were present. Similarly, although the Government alleges that the bag was not like luggage (Brief for Government at 15-18), the record is silent as to its exact size, shape or construction. See III-C *infra*.

were served by the search of Lafayette's shoulder bag, the search violated Illinois law. Yet, since the state did not raise the issue at the hearing, Lafayette was precluded from advancing this argument or even adducing evidence on this point. Thus, this is the type of situation, described in *Cardinale* v. *Louisiana*, 394 U.S. at 439, in which the failure to raise an issue in a timely manner in the trial court has precluded consideration of an adequate state ground.

Another justification for finding the waiver holding to be an adequate state ground lies in the fact that the state contested neither Lafayette's waiver argument nor the appellate court's waiver ruling in Illinois courts. The state raised the issue in its original brief in the appellate court. At that time no explanation was provided for the failure to present the issue at the suppression hearing. Although Lafayette, in his brief, argued that the issue had been waived, the state did not respond, filing no reply brief and presenting no oral argument to the appellate court. Under Illinois law, the state may be deemed to have admitted the validity of the defense argument by failing to make a response. *People ex rel. Andrew* v. *Chicago, M. & St. P. R.R.*, 324 Ill. 43, 154 N.E. 472, 473 (1926); *City of West Chicago* v. *Clark*, 58 Ill. App. 3d 847, 374 N.E.2d 1277, 1282 (1978); Ill. Rev. Stat. ch. 110A, § 341(e)(7) (1979).

Furthermore, the state did not challenge the appellate court's finding of waiver in Illinois courts. No petition for rehearing was filed with the appellate court nor was the point included in the state's petition for leave to appeal to the Illinois Supreme Court. In fact, the state has addressed the issue of waiver for the first time in its brief in this Court. In concluding that no federal question was presented in *Cincinnati, N.O. & T.P. Ry.* v. *Slade*, 216 U.S. 78 (1910), the Court found it significant that the plaintiff in error never challenged the nonfederal ground relied upon the court below. Since the state in the instant case has also neglected to seek review of the state ground upon which the decision was based, this Court should decline to consider the federal question argued by the state.

The state suggests in its brief that the issue was, in fact, raised at the hearing. However, the sole justification advanced by the state at the suppression hearing was that it was a proper inventory search (J.A. 17-18). The only case cited by either side was *People* v. *Bayles*, 82 Ill. 2d 128, 411 N.E.2d 1346 (1980), *cert. denied*, 453 U.S. 923 (1981), a case dealing exclusively with the propriety of an inventory search. Indeed all comments of the court and counsel related to this point. In claiming the issue was raised, the state points to its statement that "[t]he question is is there a constitutional bar to looking into that bag" (J.A. 18). However, this very general statement of the issue hardly alerted either Lafayette or the trial court that the state was seeking to justify the search as incident to the arrest.

The state also contends that the issue was raised in its trial court brief in opposition to the suppression motion. However, the state's brief was not filed until 20 days after the hearing, thereby denying Lafayette the opportunity to adduce evidence relating to this issue or to advance alternative state grounds.[16]

Consequently, when the state on appeal sought to justify the search as incident to the arrest, the appellate court properly invoked the long-standing Illinois rule that points not presented to the trial court in a timely manner cannot be considered on appeal (J.A. 27, *citing People* v. *Fuentes*, 91 Ill. App. 3d 71, 414 N.E.2d 876 (1980)). *See People* v. *Holloway*, 86

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[16] The state has mistakenly placed great reliance on *Steagald* v. *United States*, 451 U.S. 204 (1981), a case involving a federal procedural default rule. The discussion of waiver in *Steagald* is not binding on Illinois, which is free to adopt its own procedural rules. *Wolfe* v. *North Carolina*, 364 U.S. 177 (1960). Even were the reasoning of *Steagald* to be applied here, it would preclude review of the federal question since the question was not raised "in a timely fashion during the litigation." 451 U.S. at 209. *People* v. *Keller*, No. 55745, Sup. Ct. Ill. (Nov. 18, 1982), also relied upon by the state, is inapposite because, unlike the instant case, it involved an issue raised for the first time on appeal by the party which prevailed below.

Ill. 2d 78, 426 N.E.2d 871 (1981). Therefore, because the court below rejected the search-incident-to-arrest theory on this adequate state procedural ground, which served legitimate state interests, Lafayette urges this Court to decline to review the search as one incident to arrest.

III. THE STATION-HOUSE SEARCH OF LAFAYETTE'S SHOULDER BAG, IN WHICH HE HAD A HIGH EXPECTATION OF PRIVACY INDEPENDENT OF THAT IN HIS BODY AND CLOTHING, CANNOT BE UPHELD AS A DELAYED SEARCH INCIDENT TO THE ARREST.

Even if this Honorable Court does not defer to the appellate court's waiver holding (See Issue II), it should not consider whether the search was incident to the arrest because "the record fails to support the theory now advanced." *Jones* v. *United States*, 357 U.S. 493, 500 (1958) (Court declined to consider contention that search was incident to arrest where purpose of entry to home was to search for evidence seized and not to arrest). As Officer Mietzner testified, he examined the contents of the shoulder bag, which was under his control, out of curiosity and because "everything [had] to be inventoried" (J.A. 15). Moreover, immediately before searching the contents of the bag, he patted the outside of the bag and did not believe it to contain a gun or drugs (J.A. 12, 14-15). Since the record reveals the search was conducted as part of an inventory, the search-incident-to-arrest theory should not be reached.

Assuming, arguendo, that the question is properly before this Court, the search, in any event, was unreasonable and beyond the scope of the search-incident-to-arrest exception to the warrant requirement.

A. The Search Was Unreasonable And Beyond The Scope Of The Search-Incident-To-Arrest Exception Because It Was Remote In Time And Place From The Arrest And Was Conducted In The Absence Of Any Exigency Or Probable Cause.

As a general rule "a search of private property must be both reasonable and pursuant to a properly issued search warrant" to comply with the Fourth Amendment. *Arkansas* v. *Sanders*, 442 U.S. 753, 758 (1979). Thus a search may be invalidated solely because a warrant was not obtained or because it was unreasonable in light of all the surrounding circumstances. *See Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973).

1. A warrant was required.

The exceptions to the warrant requirement are few and have been "jealously and carefully drawn" [*Jones* v. *United States*, 357 U.S. 493, 499 (1958)] to reach "that which is necessary to accommodate the identified needs of society." *Sanders*, 442 U.S. at 760. Moreover, because each exception "invariably impinges to some extent on the protective purpose of the Fourth Amendment," the burden is on the party seeking the exemption to show the need for it. *Sanders*, 442 U.S. at 759-60. *See United States* v. *Jeffers*, 342 U.S. 48, 51 (1951), and *Mincey* v. *Arizona*, 437 U.S. 385 (1978).

A lawful arrest creates a situation which permits a warrantless, contemporaneous search of the person and the area within his immediate control. Such searches are considered valid because of the need to remove weapons, which might be used for resisting arrest or effecting an escape during transport to the station, and the need to prevent the concealment or destruction of evidence. *Chimel* v. *California*, 395 U.S. 752, 763 (1969); *New York* v. *Belton*, 453 U.S. 454, 457 (1981).

This Court has recognized, however, that the scope of the search must be strictly tied to and justified by the circumstances which rendered its initiation permissible. Thus in *Chimel*, the Court narrowed the spatial scope of the search from that which had been recognized in prior decisions to the

area from within which an arrestee might gain possession of a weapon or destructible evidence. No comparable justification was found for searching beyond this area. 395 U.S. at 763. *See Terry* v. *Ohio*, 392 U.S. 1 (1968); *Belton*, 453 U.S. at 457; *Mincey*, 437 U.S. at 393.

Similarly, this Court has placed temporal limitations on the scope of this exception by holding that the search must be contemporaneous with the arrest. No comparable justification for allowing a search remote in time or place from the arrest has been found to exist. *See, e.g., Preston* v. *United States*, 376 U.S. 364 (1964); *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968).[17] With respect to searches of automobiles, for example, this Court has held that the passenger compartment may be searched as a "contemporaneous incident" of an arrest on a public highway (*Belton*, 453 U.S. at 460); however, an automobile may not be searched as an incident to the arrest once the car has been taken to another place and the accused is in custody. (*Preston*, 376 U.S. at 367; *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. at 220-21). As noted by Justice White in *Chambers* v. *Maroney*, 399 U.S. 42, 47 (1970), "the reasons that have been thought sufficient to justify warrantless searches carried out in connection with an arrest no longer obtain when the accused is safely in custody at the station house."[18]

This Court's opinions in *United States* v. *Chadwick*, 433 U.S. 1 (1977), and *Arkansas* v. *Sanders*, 442 U.S. 753 (1979), reaffirmed these temporal limitations and also recognized that an arrested person retains a high privacy interest in the contents of his repositories of personal effects. In *Chadwick*, the

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[17] *See also Agnello* v. *United States*, 269 U.S. 20 (1925); *Stoner* v. *California*, 376 U.S. 483, 486 (1964); *Shipley* v. *California*, 395 U.S. 818 (1969).

[18] In *Chambers* the Court upheld a search, which was remote in time and place from the arrest and based on probable cause, under the "automobile exception". In contrast, a shoulder bag in custody in the station is involved here and there was no probable cause to search it.

Court held that, in the absence of any exigency, a warrant was required to search the contents of luggage, which had been seized at the time of arrest, even though there was probable cause to search it for contraband. The Court emphasized the high expectation of privacy in the contents of personal luggage and rejected the Government's contention that that expectation of privacy was lost by virtue of the arrest. 433 U.S. at 16 n.10. The Court thus concluded that "warantless searches of luggage or other property seized at the time of arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' . . . or no exigency exists." 433 U.S. at 15, *quoting Preston*, 376 U.S. at 367 (citation omitted).

Similarly, in *Sanders*, the Court held that, in the absence of any exigency, the police could not conduct a warrantless search of a suitcase following its removal from a taxi. The Court noted that, where the police, "without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained." 442 U.S. at 766.[19] In a concurring opinion, Chief Justice Burger, the author of *Chadwick*, summarized his earlier opinion as follows:

> "[The] essence of our holding in Chadwick is that there is a legitimate expectation of privacy in the contents of a trunk or suitcase accompanying or being carried by a person; that expectation of privacy is not diminished simply because the owner's arrest occurs in a public place. Whether arrested in a hotel lobby, an airport, a railroad terminal, or on a public street, as here, the owner has the right to

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[19] This Court has since rejected some of the reasoning in *Arkansas* v. *Sanders*, but not its holding, which still applies to luggage in an automobile where there is probable cause to search the luggage but not the automobile, i.e., where the relationship between the automobile and luggage is purely coincidental. *United States* v. *Ross*, ___ U.S. ___, 72 L.Ed.2d 572, 593 (1982).

> expect that the contents of his luggage will not, without his consent, be exposed on demand of the police." 442 U.S. at 766-67.

In the instant case the search of Lafayette's shoulder bag was subject to the warrant requirement since it was a repository for personal private effects. *Sanders*, 442 U.S. at 762 n.9. Moreover, Lafayette had a legitimate expectation of privacy in the contents of his bag, which was not reduced simply because he was carrying it when he was arrested in a public place. *Chadwick*, 433 U.S. at 16 n.10; *Sanders*," 442 U.S. at 766-67 (Burger, C.J., concurring).

Although a warrantless search of the bag might have been permissible at the time of the arrest under the Fourth Amendment,[20] the search here was not conducted until the bag was taken from Lafayette at the station and was "securely in the control of the police." *Sanders*, 442 U.S. at 767. As the state concedes, the search took place after it was determined that Lafayette would be taken to a jail cell and after he was ordered to remove his clothing (J.A. 14, 16; Brief for Petitioner at 3-4, 17). The search thus was conducted as part of a routine caretaking procedure since the police were going to store and safeguard the bag while Lafayette was in a cell. (See Issue I)

Since the search was remote in time and place from the arrest and no exigency existed, the search failed to comply

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[20] Assuming the bag was not inaccessible to Lafayette, a contemporaneous search would appear to have been proper under the Fourth Amendment. *See, e.g., Draper* v. *United States*, 358 U.S. 307 (1959). However, a contemporaneous search may not have been permissible under Illinois law because there was no evidence for which to search and the officer had no fear for his safety. *See People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); Ill. Rev. Stat. ch. 38, § 108-1 (1979). In any event, it is without question that the delayed search violated Illinois law. *People* v. *Helm*. See argument II of this brief.

with the warrant requirement and was unreasonable. *Chadwick*, 433 U.S. at 15.[21]

The state contends this case is different from *Chadwick* and *Sanders* because, according to the state, Lafayette "continued wearing the purse until the time of the search when he placed it on the counter in front of the officer who performed the search" (Brief for Petitioner at 19). This argument should be rejected because it is based upon controverted testimony which cannot be asserted as fact.

Although Officer Mietzner testified that Lafayette placed his shoulder bag on the counter, Lafayette testified that one officer grabbed him and another took the bag from him and threw it on the counter (J.A. 10). No finding of fact was made regarding this conflicting testimony by the trial court. However, on appeal, the court found that Lafayette "had been secured" and that "the shoulder bag was in the officer's exclusive possession" (J.A. 28). These findings are supported by Lafayette's testimony, which, under Illinois law, the court below viewed favorably.[22] *People* v. *Holloway*, 86 Ill. 2d 78, 426 N.E.2d 871 (1981).

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[21] Although Lafayette maintains that the search was both (1) remote in time and place from the arrest and (2) not justified by any exigency, the rule from *Chadwick* is that either one of these facts standing alone would trigger the warrant requirement. 433 U.S. at 15.

[22] Where a trial judge makes no express findings, a reviewing court in Illinois is bound to view the evidence based on the testimony most favorable to the prevailing party unless it is clearly unreasonable. *People* v. *Haskell*, 41 Ill. 2d 25, 241 N.E.2d 430 (1968). Illinois law also provides that the order allowing or denying a motion to suppress evidence illegally seized "shall state the findings of facts and conclusions of law upon which the order or judgment is based." Ill. Rev. Stat. ch. 38, § 114-12 (e) (1979). The state did not make a request for findings following the court's order which summarily allowed the motion. Accordingly, the state cannot complain now of the absence of findings or assume a finding in its favor.

Moreover, it would be unjust to reject these findings by the appellate court, particulary since the state's belated search-incident claim prevented the presentation of relevant evidence at the suppression hearing. (See Issue II) The true facts may actually be that Lafayette was fifty feet away from Mietzner, surrounded by police officers, and in the act of removing his pants when the contents of the bag were searched. Since the state had the burden to prove the exception upon which it relies, it should have developed facts to support that theory. *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951).[23]

Accordingly, as in *Sanders*, the state here "has failed to carry its burden of demonstrating the need for [a] warrantless [search]." 442 U.S. at 763. The appellate court correctly found that the bag was in the officer's exclusive control and a warrant was required.[24]

2. The search was unreasonable.

Although this search should be invalidated solely because a warrant was not obtained, it is evident that the search was also unreasonable in light of all the surrounding circumstances. *Sanders*, 442 U.S. at 758; *Cady* v. *Dombrowski*, 413 U.S. at 442. Significantly, there was no probable cause to search and

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[23] Based upon its erroneous assertion of fact, the state argues that *Belton* applies to this case (Brief for Petitioner at 19). Actually the holding of *Belton* permits, as a "contemporaneous incident" of arrest, only a search of the passenger compartment of an automobile. 453 U.S. at 460. As the Court explicitly stated, this holding "[did] no more than determine the meaning of Chimel's principles in this particular and problematic context." 453 U.S. at 460 n.3. There is little or no danger that an arrestee will gain access to a container which has been removed from him inside a police station.

[24] It should be noted that in *Sanders* the risk that the respondent or his companion would gain access to the suitcase was actually greater than the risk here that Lafayette would gain access to his bag. In *Sanders* the search was conducted on the street; here it was at the station house.

the search was not conducted to serve any of the purposes of a search incident to arrest. Officer Mietzner had no reason to search the bag other than to inventory it. Furthermore, the bag was not searched to prevent Lafayette from obtaining a weapon or destroying evidence (J.A. 14-15). *See Chimel* v. *California*, 395 U.S. at 763.

These circumstances compel a finding of unreasonableness. As noted in *Chambers* v. *Maroney*, 399 U.S. 42, 51 (1970):

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.

Similarly, the fact that no purpose for conducting a search incident to arrest was present merits weight. *See People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); *People* v. *Bean*, 107 Ill. App. 3d 662, 437 N.E.2d 1295 (1982), *petition for cert. filed*, (No. 82-948).

It is recognized that in *United States* v. *Robinson*, 414 U.S. 218 (1973), the Court rejected a rule which would require litigation in each case of the issue of whether there was present one of the purposes supporting the authority for a search of the person incident to arrest. Similarly, it is recognized that in *Robinson* the Court permitted the search without probable cause.

The Court's rationale in making these findings was that a police officer's determination to search was "necessarily a quick ad hoc judgment." 414 U.S. at 235. In this case, however, there was no search made at the time of the arrest, but rather a routine station-house inventory procedure was followed. Given the factual context of this case, there is no reason to dispense with the probable cause requirement. Nor should the rationale which underlies a search incident to arrest be ignored. *See Preston* v. *United States*, 376 U.S. 364; *Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. at 220.

As noted by Justice Frankfurter, the right to search incident to arrest must be analyzed within its factual context:

> "[T]he basis of any right to search as an incident to arrest [must be] put in proper focus. Photographs can be so taken as to make a midget look like a giant, and vice versa. The same kind of distortion results if a legal doctrine embedded in a larger matrix of principle is taken out of the matrix and elevated to an independent position. In plain English, the right to search incident to arrest is merely one of those very narrow exceptions to the 'guaranties and immunities which we had inherited from our English ancestors, and which had from time immemorial been subject to certain well-recognized exceptions arising from the necessities of the case.'" *United States* v. *Rabinowitz*, 339 U.S. 56, 71-72 (1949) (dissenting opinion) (citations omitted).

Accordingly, this Court should find that the warrantless search was unreasonable and beyond the scope of one incident to arrest because it was remote in time and place from the arrest and no exigency or probable cause existed for the search. A finding by this Court that the search was unreasonable would be consistent with both the facts of this case and the decisions of this Court. Indeed since an automobile cannot be searched incident to arrest without probable cause where it has been driven from the place of arrest to the station house *(Dyke; Preston)*, it would be anomalous to find that a shoulder bag, in which there is a substantially greater expectation of privacy, can be searched inside the station. The search thus violated the warrant requirement as well as the reasonableness standard of the Fourth Amendment.[25]

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[25] Several courts have rejected the argument that the police can conduct a delayed search, as an incident to the arrest, of repositories of personal effects which were being carried or were within the arrestee's reach at the time of arrest. *See, e.g., United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978); *United States* v. *Rengifo-Castro*, 620 F.2d 230 (10th Cir. 1980); *United States* v. *Gooch*, 603 F.2d 122 (10th Cir. 1979); *United States* v. *Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981); *United States* v. *Calandrella*, 605 F.2d 236, 249

B. Contrary To The State's Contention, This Case Is Not Controlled By *Robinson* And *Edwards*.

The State argues that this case is distinct from *Chadwick* and *Sanders* and controlled by *United States* v. *Robinson*, 414 U.S. 218 (1973), and *United States* v. *Edwards*, 415 U.S. 800 (1974). According to the state, a lawful arrest authorizes a subsequent station-house search of the person and all containers which were within his possession at the time of arrest (Brief for Petitioner at 9-10, 14-15, 21).

Without explicitly stating so, the state asks this Court to reject the reasoning in *Chadwick* and *Sanders* to the effect that one's expectation of privacy in the contents of repositories of personal effects accompanying or being carried at the time of his arrest is not diminished by virtue of the arrest and is independent of the expectation of privacy in one's body and clothing. *Chadwick*, 433 U.S. at 15 & 16 n.10; *Sanders*, 442 U.S. at 766-67 (Burger, C.J., concurring). However, there is no need to reject the reasoning in *Chadwick* and *Sanders*. Nor is this case controlled by *Robinson* and *Edwards*.

Robinson recognized that the search-incident-to-arrest exception to the warrant requirement had historically been formulated into two distinct propositions: (1) the search of a person; and (2) the search of the area within the control of the

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(6th Cir.), *cert. denied, sub nom.*, *Kaye* v. *United States*, 444 U.S. 991 (1979); *United States* v. *Lace*, 502 F. Supp. 1021 (D. Vt. 1980), *aff'd*, 669 F.2d 46 (2d Cir. 1982); *United States* v. *Musick*, 534 F. Supp. 954, 962-63 (N.D. Cal. 1982); *Matter of B.K.C.*, 413 A.2d 894 (D.C. Ct. App. 1980); *United States* v. *Farrar*, 470 F. Supp. 128 (S.D. Miss. 1979); *People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); *State* v. *Dudley*, 561 S.W.2d 403 (Mo. Ct. App. 1978); *State* v. *Stevens*, 26 Wis. 2d 451, 132 N.W.2d 502 (1965); *State* v. *Pender*, 66 Ohio Misc. 23, 419 N.E.2d 1141 (1980); *Bradford* v. *State*, ___ Ind. App. ___, 401 N.E.2d 77 (1980). *See also United States* v. *Corbin*, 494 F. Supp. 244 (M.D. N.C. 1980); *United States* v. *Jones*, 317 F. Supp. 856 (E.D. Tenn. 1970).

arrestee. 414 U.S. at 224. *Robinson* and *Edwards*, unlike this case, both involved situations falling within this first proposition. In *Robinson*, a contemporaneous full search of the person was allowed to disarm the person and discover evidence.[26] In *Edwards*, the seizure of clothing worn by an arrestee as evidence of a crime was upheld by the Court. The very distinction between the person and repositories of personal effects in his control is what the Court recognized in *Chadwick*, where both *Edwards* and *Robinson* are distinguished:

> "Unlike searches of the person, *United States* v. *Robinson*, 414 U.S. 218 (1973); *United States* v. *Edwards*, 415 U.S. 800 (1974), searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10.

The state thus reads *Robinson* and *Edwards* too broadly and fails to recognize the distinction that exists between a search of the person and a search of a repository of personal effects, such as a shoulder bag.

The state also argues that *Edwards* supports a delayed search of repositories of personal effects incident to arrest. Lafayette recognizes that *Edwards* suggests that property which the accused decides to carry with him from the place of the arrest to the place of detention may be seized and searched. 415 U.S. at 803, *quoting Abel* v. *United States*, 362 U.S. 217 (1960). In *Edwards* the question, however, was actually whether the warrantless seizure[27] of clothing as evidence of a

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[26] Although a crumpled cigarette package was removed from the arrestee's pocket and searched, the Court did not engage in a "container" analysis. More importantly, however, the package was searched immediately. *Robinson* provides no support for a delayed search of a container.

[27] Although *Edwards* uses the word "search" in parts of its opinion, the discussion mostly refers to a "seizure." The questions, whether a visual inspection of outer clothing constitutes a search and whether a person has a legitimate expectation of privacy in the condition and

crime could be justified where the arrestee had been in custody for ten hours. In upholding the seizure, the Court noted that no suitable clothing had been available at the time Edwards was placed in jail. The Court further found that it was reasonable to seize and examine the clothing for paint chips, given the existence of probable cause linking the clothes to a crime and given the danger of destruction of the evidentiary value of the clothing. 415 U.S. at 805-06. The Court then explicitly limited its holding to the facts before it, noting that it was not holding that the warrant clause was never applicable to a post-arrest seizure of the effects of the arrestee. 415 U.S. at 808.

Edwards, unlike this case, thus involves the seizure of clothing of an arrestee where there was probable cause that it constituted evidence of a crime and where the seizure was necessary to prevent loss of the evidence.

Abel v. *United States* is also distinguishable from this case. In *Abel*, the petitioner, who was suspected of being a Russian spy, was arrested pursuant to a deportation arrest warrant. A fifteen-to-twenty-minute search was then conducted of his person and of all his belongings in his hotel room and the adjoining bathroom. Abel then chose the belongings which he wished to take with him, and immigration officers assisted him in packing his belongings. Subsequently, all of Abel's belongings were searched more thoroughly at Immigration headquarters. A birth certificate and other evidence of Abel's illegal status were discovered and seized at that time. 362 U.S. at 221-25. In upholding the validity of this later search, the Court noted that it had been conducted to secure evidence of his illegal status. Furthermore, the Court emphasized that the search had only involved a more thorough search of items Abel had decided to take with him. 362 U.S. at 238-39.

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appearance of his outer clothing which is exposed to public view, were not raised. The Court has since noted that an arrestee has little or no expectation of privacy in his person or clothing being worn. *See Bell* v. *Wolfish*, 441 U.S. 520 (1979).

Abel is thus different from the instant case because the search there started in the hotel room and was merely continued at the place of detention. Moreover, the search involved the belongings Abel chose to bring with him, and there was probable cause to search for evidence of his illegal status. *See State* v. *Brown*, 291 Or. 642, 634 P.2d 212, 218 n.8 (1981).

To the extent, however, that *Abel* suggests a warrantless search of luggage can be conducted at the station in the absence of any exigency, the decision is simply inconsistent with *Chadwick* and *Sanders*. Furthermore, some of the precedents and principles underlying the decision in *Abel* were subsequently overruled. Specifically, the *Abel* Court relied upon *Harris* v. *United States*, 331 U.S. 145 (1946), in finding that the fifteen-to-twenty-minute search at the hotel was proper. 362 U.S. at 238-39. *Harris* and its progeny were overruled, however, in *Chimel* v. *California*, 395 U.S. 752, 768 (1969). Accordingly, *Abel's* continuing validity is questionable. *See United States* v. *Hernandez-Rojas*, 470 F. Supp. 1212, 1221-22 (E.D. N.Y.), *aff'd*, 615 F.2d 135 (2d Cir. 1979).

Consequently, *Robinson*, *Edwards* and *Abel* should not be found to control this case.

C. Lafayette's Expectation Of Privacy In The Contents Of His Bag Was Not Reduced By Virtue Of The Arrest Under The Theory That The Bag Was Immediately Associated With His Person.

In its amicus brief, the Government argues that containers which can be said to be immediately associated with the person can be searched incident to the arrest even if, at the time of the search, the container is within the exclusive possession of the police. The Government reads this Court's decisions as requiring a case-by-case determination of whether a particular repository within the arrestee's control at the time of arrest is luggage or whether it is some other type of container that can be said to be immediately associated with the person (Brief for Government at 14-19). This position is essentially rejected by the state, which recognizes that a rule which would distinguish

between various types of repositories is inconsistent with the Fourth Amendment (Brief for Petitioner at 20-21).

The Government bases its claim on the following passage from *Chadwick:*

> "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." 433 U.S. at 15.

According to the Government, the implication of the qualifying phrase "not immediately associated with the person of the arrestee" is that personal property that is so associated may be subject to a search at the station house. The Government argues that Lafayette's shoulder bag was like a purse or wallet, which ordinarily is carried on the person or kept within ready access at all times, and, therefore, according to the Government, was immediately associated with his person (Brief by Government at 15-17).

Chadwick, however, involved the question whether a warrant was required to open a footlocker that was lawfully in police possession. 433 U.S. at 7 n.3. The Court answered this question in part (3) of the opinion where it concluded that it was unreasonable to conduct a warrantless search. 433 U.S. at 11. The qualifying phrase in question is contained in part (4) of the opinion and is not stated as part of the holding of the case. Therefore, it would appear that the Court only meant the phrase to encompass searches of clothing being worn. *See* 433 U.S. at 16 n.10. There is no reason to read the qualifying phrase more broadly so as to include repositories such as shoulder bags, particularly since there was no need for the Court in *Chadwick* to discuss such matters.[28]

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[28] The situation is analogous to a passage in *Peters* v. *New York*, 392 U.S. 40 (1968), which drew attention in *United States* v. *Robinson*, 414 U.S. 218, 229 (1973):

> We do not believe that the Court in Peters intended in one unexplained and unelaborated sentence to impose a novel and

Although some courts do not view the qualifying phrase from *Chadwick* to exempt containers, other courts find that the qualifying phrase does exempt certain types of containers and litigate on a case-by-case basis whether a particular container is luggage or simply property immediately associated with the person.[29] Application of this test, which is based upon one unelaborated phrase taken out of context, predictably, has resulted in conflicting results over whether containers such as a purse, shoulder bag, backpack, briefcase or suitcase are immediately associated with the person.[30] Some courts, which feel compelled to apply *Chadwick's* supposed qualifying-phrase test, have found it to be so unworkable that they have

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far-reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest.

See Snyder v. *State*, 629 S.W.2d 930 (Crim. App. Tex. 1982) (Clinton, J., dissenting).

[29] *Compare People* v. *Helm*, 89 Ill. 2d 34, 431 N.E.2d 1033 (1981); *United States* v. *Monclavo-Cruz*, 662 F.2d 1285 (9th Cir. 1981), *with Dawson* v. *State*, 40 Md. App. 640, 395 A.2d 160 (1978); *Hinkel* v. *Anchorage*, 618 P.2d 1069 (Alas. 1980).

[30] Cases finding a container to be immediately associated with the person include *People* v. *Harris*, 105 Cal. App. 3d 204, 164 Cal. Rptr. 296 (1980) (purse); *Dawson* v. *State*, 40 Md. App. 640, 395 A.2d 160 (1978) (purse); *United States* v. *Graham*, 638 F.2d 1111 (7th Cir.), *cert. denied*, 450 U.S. 1034 (1981) (shoulder purse); *Hinkel* v. *Anchorage*, 618 P.2d 1069 (Alas. 1980) (purse); *Stewart* v. *State*, 611 S.W.2d 434 (Crim. App. Tex. 1981) (purse); *Farb* v. *State*, 634 S.W.2d 14 (Ct. App. Tex. 1982) (backpack); *Jones* v. *State*, 640 S.W.2d 918 (Crim. App. Tex. 1982) (briefcase).

Those finding various containers not to be immediately associated with the person include *United States* v. *Corbin*, 494 F. Supp. 244 (M.D. N.C. 1980) (purse); *United States* v. *Farrar*, 470 F. Supp. 128 (S.D. Miss. 1979) (purse); *Ulesky* v. *State*, 379 So. 2d 121 (Dist. Ct. App. Fla. 1979) (purse); *United States* v. *Schleis*, 582 F.2d 1166 (8th Cir. 1978) (briefcase); *Miller* v. *Superior Court*, 127 Cal. App. 3d 494, 179 Cal. Rptr. 783 (1981) (brown paper bag and tote bag).

fashioned holdings based upon state constitutional grounds. *See, e.g., State* v. *Caraher*, 293 Or. 741, 749-50, 653 P.2d 942 (1982).

Lafayette's position is that no qualifying-phrase test was established by *Chadwick*. Yet, even if the Court did intend such a rule, it is unworkable. As noted in *United States* v. *Ross*, ____ U.S. at ____, 72 L. Ed. 2d 572, 592 (1982), a constitutional distinction between "worthy" and "unworthy" containers is foreclosed by the central purpose of the Fourth Amendment, which protects privacy interests. Accordingly, no rule should be adopted which would require courts to determine on a case-by-case basis whether items such as boxes, paper bags, purses, carry-on luggage and even the hobo's knitted scarf are luggage-like repositories or simply effects which are immediately associated with the person.[31]

A more workable rule, consistent with the protection of privacy interests, would allow containers which are accessible to the arrestee to be searched contemporaneously with the arrest; however, once the accused is secured at the station house and the container has been removed from his reach, no warrantless search should take place in the absence of exigent circumstances. This rule should apply to containers which are not part of the clothing of the citizen and, therefore, can be reduced to the exclusive control of the police without removal

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[31] Factors relied upon in applying this test include whether the container is normally carried by the person or remains within his control and whether it serves the same function as pockets. *See, e.g., United States* v. *Berry*, 560 F.2d 861 (7th Cir. 1977), *vacated on other grounds*, 571 F.2d 2 (7th Cir.), *cert. denied*, 439 U.S. 840 (1978). It should not be overlooked that the state, by not raising this issue at the suppression hearing, prevented the development of evidence pertaining to these factors. There is not even a description of the shoulder bag in the record.

of the arrestee's clothing. *See State* v. *Caraher*, 293 Or. at 770-71 (Lent, C.J., dissenting).[32]

In sum, Lafayette had a high expectation of privacy in his shoulder bag independent of that in his body and clothing. Moreover, the state did not meet its burden to show the need for the warrantless search. The delayed search was thus beyond the scope of one incident to arrest. Furthermore, it was unreasonable, particularly because there was no probable cause to search and the search was not based on any exigency.

CONCLUSION

For the foregoing reasons the decision of the Appellate Court of Illinois should be affirmed.

Respectfully submitted,

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[32] A wallet or other container, such as a sealed letter or package, within an arrestee's clothing logically would fall within this rule and would not be subject to a station-house search. However, this Court need not decide in this case whether such items are like clothing and, therefore, part of the person and subject to be searched pursuant to *Robinson* or *Edwards*. *See People* v. *Bean*, 107 Ill. App. 3d 662, 437 N.E. 2d 1295 (1982), *petition for cert. filed*, (No. 82-948).